BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SEAN M. BUTERA	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,588
FLUOR DANIEL CONSTRUCTION CORPORATION	)	
Respondent	)	
AND	)	
	)	
CNA GROUP	)	
Insurance Carrier	)	

AND

SEAN M. BUTERA	)	
Claimant	)	
VS.	)	
	)	
FLUOR DANIEL CONSTRUCTION CORPORATION and WOLF CREEK NUCLEAR OPERATING CORPORATION	)	Docket No. 231,584
Respondents	)	
AND	)	
	)	
CNA GROUP	)	
Insurance Carrier	)	

ORDER

These claims return to the Board due to the Court of Appeals' order for remand. The Board initially decided this proceeding on February 25, 2000. But in its January 26, 2001 opinion, the Court of Appeals reversed the Board and remanded the proceeding to the Board "for further proceedings" consistent with the Court's opinion.

ISSUES

The facts are not in dispute. Claimant was seriously injured on November 23, 1997, when he crashed into a concrete barrier protecting an abandoned, unlighted guard shack

while on his way to work at the Wolf Creek nuclear power plant. At the time of the accident, claimant was employed by Fluor Daniel Construction Corporation (Fluor Daniel), who had contracted with Wolf Creek Nuclear Operating Corporation (Wolf Creek) to provide fueling services at the Wolf Creek plant.

In its February 25, 2000 Order, the Board determined that claimant's accident arose out of and in the course of employment with Fluor Daniel because travel was an integral part of claimant's job. The Board also determined that claimant could not pursue workers compensation benefits from Wolf Creek as a "statutory employer" because Fluor Daniel had workers compensation insurance.[1]

But the Court of Appeals disagreed with the Board's analysis and held that travel was not an integral part of claimant's job. In the final sentence of its opinion, the Court of Appeals "[r]eversed and remanded [the proceeding] for further proceedings consistent with this opinion." The Court of Appeals did not otherwise provide any directions with its order for remand.

In its February 25, 2000 Order, the Board did not address claimant's arguments that Wolf Creek's premises should be considered the premises of Fluor Daniel for purposes of the premises exception and the special hazard exception to the "going and coming" rule. Therefore, it is reasonable to conclude that the Court of Appeals remanded the proceeding for the Board to address those arguments.

The only issue before the Board on this remand is whether either the premises exception or the special hazard exception to the "going and coming" rule is applicable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. For the reasons explained below, the Board concludes neither the premises exception nor the special hazard exception to the "going and coming" rule is applicable. Therefore, claimant's request for benefits against Fluor Daniel and its insurance carrier should be denied.

2. Accidents occurring while employees are on their way to work are generally not compensable. But accidents that occur either on an employer's premises or on the only available route to or from work may be compensable depending upon the facts.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to

[1] See K.S.A. 1997 Supp. 44-503(g).

> the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. **An employee shall not be construed as being on the way to assume the duties of employment** or having left such duties at a time **when the worker is on the premises of the employer** or **on the only available route to or from work which is a route involving a special risk or hazard** and **which is a route not used by the public except in dealings with the employer. . . .**[2] (Emphasis added.)

The above statute is a codification of Kansas' "going and coming" rule and provides two exceptions to that rule – a premises exception and a special hazard exception.[3]

3. The plain language of the Workers Compensation Act requires the employee to be on the employer's premises before the premises exception will apply. Before the special hazard exception applies, the hazard must be on a route to work not used by the public except in dealings with the employer. Because claimant's accident occurred on Wolf Creek's land rather than Fluor Daniel's premises, the premises exception does not apply. Because the accident occurred on a route to Wolf Creek rather than on a route to Fluor Daniel, the special hazard exception does not apply.

In his brief delivered to the Board on May 31, 2001, claimant argues that Wolf Creek's premises should be considered Fluor Daniel's premises for purposes of the "going and coming" rule. Given that claimant would be considered a "statutory employee" of Wolf Creek, that argument has some merit. But claimant fails to cite any authority to support that argument and the Board is unaware of any. Conversely, the Board is aware that the Kansas Supreme Court has narrowly construed the term "premises" to be an area controlled by the employer.[4]

Although the abandoned, unlighted guard shack constituted a special hazard located on claimant's only available route to work, the accident is not compensable against Fluor Daniel as (1) the accident did not occur on Fluor Daniel's premises, and (2) the accident did not occur on a route not used by the public except in dealings with Fluor Daniel.

4. In their letter to the Board dated May 25, 2001, Fluor Daniel and its insurance carrier contend the Board should not address claimant's arguments regarding the premises and

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[2] K.S.A. 1997 Supp. 44-508(f).

[3] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[4] *Thompson*, syl. 1.

special hazard exceptions to the "going and coming" rule. They argue that in the February 25, 2000 Order, the Board expressly adopted the administrative law judge's orders as contained in the judge's June 10, 1999 decision and, therefore, the Board adopted the judge's findings and ultimate conclusion that the premises and special hazard exceptions did not apply.

Fluor Daniel and its insurance carrier are correct that the Board adopted orders from the judge's June 1999 decision. But their argument that the Board adopted the judge's findings and conclusions is without merit as it contradicts the plain language used in the Board's February 25, 2000 Order. In the award section of the February 25, 2000 Order, the Board stated:

> The Appeals Board adopts the remaining orders set forth in the [June 10, 1999] Award to the extent they are not inconsistent with the above.

The Board did not address either the premises exception or the special hazard exception to the "going and coming" rule. Further, the Board did not adopt the judge's findings or conclusions regarding those issues.

5. Following the Court of Appeals' January 26, 2001 opinion, claimant filed a Petition for Review with the Kansas Supreme Court. On May 1, 2001, the Supreme Court entered its order denying the request for review. On May 17, 2001, claimant filed a pleading with the Division of Workers Compensation entitled Motion for Reconsideration Upon Remand from Court of Appeals (Motion for Reconsideration). The Board concludes that claimant's motion was merely a formal request for the Board to address the Court of Appeals' order for remand. This order addresses the order for remand and, therefore, no additional orders are necessary. Claimant's Motion for Reconsideration should be dismissed as the request is now moot.

6. The Board incorporates the findings and conclusions from its February 25, 2000 Order that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies its February 25, 2000 Order and denies claimant's request for benefits from Fluor Daniel and its insurance carrier. The Board dismisses claimant's Motion for Reconsideration. The order denying claimant's request for benefits from Wolf Creek remains in full force and effect. The Board adopts the remaining orders set forth in the February 25, 2000 Order that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
John David Jurcyk, Roeland Park, KS
Kim R. Martens, Wichita, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director